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8 Attorneys for Plaintiff National Credit Union Administration Board  
9 As Liquidating Agent For Western Corporate Federal Credit Union

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12 NATIONAL CREDIT UNION  
13 ADMINISTRATION BOARD AS  
14 LIQUIDATING AGENT FOR  
WESTERN CORPORATE FEDERAL  
CREDIT UNION,

15 Plaintiff,

16 v.

17 ROBERT A. SIRAVO, TODD M. LANE,  
18 ROBERT J. BURRELL, THOMAS E.  
SWEDBERG, TIMOTHY T. SIDLEY,  
19 ROBERT H. HARVEY, JR., WILLIAM  
CHENEY, GORDON DAMES, JAMES  
20 P. JORDAN, TIMOTHY KRAMER,  
21 ROBIN J. LENTZ, JOHN M. MERLO,  
WARREN NAKAMURA, BRIAN  
22 OSBERG, DAVID RHAMY and  
SHARON UPDIKE,

23 Defendants.  
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Case No.: CV10-01597 GW (MANx)

**RESPONSE TO SECOND  
SUPPLEMENTAL REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT  
OF DEFENDANTS' MOTIONS TO  
DISMISS PLAINTIFF'S SECOND  
AMENDED COMPLAINT (DOC.  
116)**

Date: July 25, 2011  
Time: 8:30 a.m.  
Courtroom: 10

1 The director defendants (the “Directors”) have requested that the Court take  
2 judicial notice of a securities action filed by the National Credit Union  
3 Administration on July 18, 2011 against RBS Securities, Inc. and other defendants.  
4 The complaint in that action (the “RBS Complaint”) seeks recovery for  
5 misrepresentations and omissions in connection with the sale of 29 private label  
6 mortgage backed securities (“MBS”) to the Western Corporate Federal Credit Union  
7 (“WesCorp”). The Directors also request judicial notice of the press release issued  
8 about the lawsuit. They argue that “the NCUA’s allegations in the RBS case are  
9 admissions that undercut and render implausible...the NCUA’s allegations in this  
10 case....” Docket 148 at 2:28-3:2.

11 Plaintiff National Credit Union Administration Board as Liquidating Agent  
12 for WesCorp (the “NCUA”) does not object to the Court taking judicial notice of the  
13 filing of the RBS Complaint or the issuance of the press release. However, the  
14 inferences the Directors seek to draw from these documents in support of their  
15 motions to dismiss are not justified by the documents and are not the proper subject  
16 of judicial notice. Moreover, nothing in the RBS Complaint undercuts or otherwise  
17 compromises the allegations of the Second Amended Complaint in this case.  
18 Rather, that Complaint vividly illustrates both the consequences of the Directors’  
19 failure to impose meaningful sector and investment-type concentration limits and  
20 the blind eye WesCorp used in its pre-purchase analyses as it acquired heavy  
21 concentrations of the riskiest AAA rated securities in order to meet the investment  
22 income targets mandated by the Directors.

23 The RBS Complaint alleges misstatements and omissions in the offering  
24 documents for 29 of the hundreds of private label MBS purchased by WesCorp from  
25 2005 through 2007. Of these, two (with AA ratings) were based on subprime loans.  
26 Seventeen were Option ARM MBS. The other ten were ALT-A MBS. The losses  
27 on these securities represented less than \$750 million of the \$6.8 billion in total  
28

1 losses and less than \$561 million of the \$4.7 billion in Option ARM MBS losses  
2 recognized by WesCorp as of December 31, 2008.

3 The RBS Complaint alleges a widespread failure to adhere to underwriting  
4 guidelines on the part of a number of originators of loans for private label MBS.  
5 That failure is an independent cause of some of WesCorp's losses. The Directors do  
6 not and cannot claim that it is a supervening cause. In particular, the losses that are  
7 the subject of the RBS Complaint would have been prevented had the Directors  
8 established meaningful concentration limits by sector and investment type, as they  
9 were required to do. Such concentration limits would have prevented the losses,  
10 regardless of whether the offering documents for some of the securities WesCorp  
11 purchased contained material misstatements or omissions.

12 As the Second Amended Complaint alleges, the purpose of concentration  
13 limits is to protect against investment losses resulting from factors that the purchaser  
14 cannot discover with due diligence. Second Amended Complaint [Docket 116] at  
15 24, ¶ 106. Sector concentration limits, such as the limits on investment in private  
16 label MBS at issue here, are imposed to limit losses from precisely the type of  
17 industry-wide events alleged in the RBS Complaint – the undisclosed, widespread  
18 abandonment of underwriting guidelines by the originators of the mortgages that  
19 formed the basis for WesCorp's private label MBS.

20 In addition, the allegations of the RBS Complaint highlight WesCorp's lack  
21 of diligence in purchasing private label MBS. That Complaint alleges that “a  
22 material percentage of the borrowers whose mortgages comprise the RMBS were all  
23 but certain to become delinquent or default shortly after origination.” Docket 148-1  
24 at 2, ¶ 6. It alleges a surge in delinquencies and defaults following the offerings that  
25 were far higher than those reported in the offering documents. *See id.* at 19-27,  
26 ¶¶ 61-66. As a result, the losses actually experienced in the first 12 months after  
27 issuance of the securities far exceeded the “expected losses” at issuance. *See id.* at  
28 29-41, ¶¶ 74-86. Finally, it suggests that loan pool information, including

1 information about delinquencies, defaults and pool losses, was provided to investors  
2 in Trustee's reports. *See id.* at 19, ¶¶ 65.

3 Of the 29 private label MBS at issue in the RBS Complaint, 17 are based on  
4 loans from Greenwich Capital Acceptance, Inc ("Greenwich") as depositor. *See id.*  
5 at 14-16, Tables 1 and 2. WesCorp purchased the first of these securities at issue in  
6 the RBS Complaint, CUSIP 61915RCL8, from MortgageIT Mortgage Loan Trust  
7 2006-1 on February 17, 2006. *See id.* at 4. The RBS Complaint alleges that by  
8 August 2006, six months after the security had been issued, the loan pool for the  
9 security had a delinquency rate of 2.8% as contrasted with the .34% in the  
10 prospectus supplement, *see id.* at 26, ¶ 65, and actual gross losses for the pool were  
11 more than 2.4 times higher than the expected gross losses, *see id.* at 39, ¶ 84.  
12 Notwithstanding this information, the RBS Complaint shows that WesCorp  
13 continued to purchase more than \$1 billion of MBS based on loans from Greenwich  
14 as depositor through June 26, 2007. *See id.* at 3-4, ¶ 8.

15 The remainder of the Greenwich loans that are the subject of the RBS  
16 complaint were issued by HarborView entities. *See id.* The RBS Complaint alleges  
17 that WesCorp purchased a HarborView 2006-8 MBS, CUSIP 41161GAE3, from  
18 Greenwich on August 1, 2006. *See id.* at 3. It alleges that six months later, in  
19 February 2007, the loan pool for the security had a delinquency rate of 6.54% as  
20 contrasted with the 2.78% in the prospectus supplement, *see id.* at 22, ¶ 65, and that  
21 it had actual gross losses of almost \$8 million compared to expected gross losses of  
22 just over \$4.6 million, *see id.* at 22, ¶ 84. Despite this information, WesCorp  
23 continued to purchase additional hundreds of millions of dollars of HarborView  
24 MBS through June 2007.

25 The allegations of the RBS Complaint are not admissions material to the  
26 pending motions to dismiss. They do not establish that liability of the Directors is  
27 implausible if the factual allegations of the Second Amended Complaint are proven.  
28 They do not establish either that the defendants in this case acted reasonably or that

1 they violated their respective duties of care. They certainly do not establish that the  
2 Directors acted diligently in mandating that WesCorp's investment portfolio  
3 generate such high levels of investment income that it was effectively prevented  
4 from prudently diversifying. Nor do they establish that the Directors were diligent  
5 in allowing WesCorp to continue purchasing the billions of dollars of relatively  
6 risky AAA rated private label MBS required to meet the budget without imposing  
7 basic meaningful sector concentration limits or investment type concentration limits.

8  
9 DATED: July 22, 2011

LUCE, FORWARD, HAMILTON & SCRIPPS LLP  
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12 By: /s/ Michael H. Bierman  
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14 Attorneys For The National Credit Union  
15 Administration Board As Liquidating Agent  
16 For Western Corporate Federal Union  
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